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HAROLD B. WILLEY, Clerk

No. 590

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD.,
Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
215 W. 7th Street
Los Angeles 14, California
TRinity 3241
Attorney for Appellant.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren, and to The Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, the F. P. NEWPORT CORPORATION, LTD., respectfully petitions for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse an order of that Court dismissing the appeal of the petitioner herein, and to review and reverse the orders

of the United States District Court affirming the Referees in Bankruptcy, which approved the sale of all the Newport assets and the payment to unsecured creditors of not only their full claim but also about 135% interest thereon; also to review and reverse the error of the United States Court of Appeals refusing to vacate the judgment of the District Court for fraud upon that Court and remand the case to the District Court for further proceedings in accordance with the motion of the appellant.

JURISDICTION

Jurisdiction is conferred by Section 24, 24(c) (U. S. Code Title XI, Chapter IV, Section 47(c)), and Section 25 (U. S. Code Title XI, Chapter IV), Section 48 of the Bankruptcy Act. The amount involved is $407,000.

Section 24(b) provides that appellate jurisdiction to the Circuit Court of Appeals of the United States "shall be exercised by appeal and in the form and manner of an appeal."

Subsection (c) of Section 24 provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force, or such as may hereafter be enacted."

Title 28, Section 1334 gives the United States District Courts original jurisdiction of all matters and proceedings in bankruptcy.

Section 1254 of Title 28 provides for the *review* by the Supreme Court:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Section 2101 (c) of Title 28 provides for review when taken or applied for within 90-days after the entry of such judgment or decree.

The appellant duly and regularly filed Notice of Appeal from the judgment of the United States District Court dated July 12, 1954 (R. 629). Notice of Appeal was filed in the District Court on August 10th, 1954, and within the time allowed by law.

After the docketing of the record a motion was made in the United States Court of Appeals for the Ninth Circuit by Paul W. Sampsell, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., on November 1st, 1954 and was heard and argued on November 10th, 1954, and an order was made and entered *per curium* November 12th, 1954 ordering the appeal of the appellant to be dismissed, (R. 706), and denying the motion of the appellant to remand the case to the District Court for hearing of evidence of a fraud perpetrated upon the District Court.

A Petition for Rehearing was duly and regularly filed on both motions, and denied by the United States

Court of Appeals for the Ninth Circuit on December 17th, 1954. (R. 708).

This petition to review and reverse the orders of the United States Court of Appeals for the Ninth Circuit on both motions is filed in this Court within the 90-day period allowed by Title 28, Section 2101 (c), U. S. Codes.

OPINIONS BELOW

The opinion of the Court of Appeals is found in the Appendix to this Petition, and also page 706 of the record.

The opinion of the Court of Appeals (9th Cir.) is found in 216 Fed. (2) 344.

The opinion of the United States District Court is found in 123 Fed. Supp. 95.

STATUTES INVOLVED

Section Twenty-Four of the Bankruptcy Act provides as follows (United States Code, Title 11, Chap. 4, Sec. 47):

> "§24. *Jurisdiction of Appellate Court.* a. The [Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia,] United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate

jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the [Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia] United States courts of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Section Twenty-Five of the Bankruptcy Act provides as follows, (United States Code, Title 11, Chap. 4, Sec. 48):

"§25. *Practice on Appeals.* a. Appeals under this Act to the [Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia] United

States courts of appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service, or, if such notice be not served and filed, then within forty days from such entry."

Section 42 Revised Code of Delaware, 1935, ch. 65, as amended in 1941, ch. 132, Sec. 11, 8 Del. C. §8 278, as follows:

"*Continuation of Corporation after Dissolution for Purposes of Suit, etc.* All corporations, whether they expire by their own limitations, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their businesses, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-

year period and until any judgments, orders, or decrees therein shall be fully executed."

Title 8, Chapter 1, Section 312 of the Delaware Code provides as follows:

"§312. *Renewal, revival, extension and restoration of charter.*

(a) Any corporation existing under the laws of this State, may, at any time before the expiration of the time limited for its existence and any corporation existing under the laws of this State whose charter has become inoperative by law for non-payment of taxes and any corporation existing under the laws of this State whose charter has expired by reason of failure to renew the same or whose charter has been renewed, but, through failure to comply strictly with the provisions of this chapter, the validity of whose renewal has been brought into question, may at any time procure an extension, restoration, renewal or revival of its charter, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original charter and all amendments thereto.

(b) The extension, restoration, renewal or revival of the charter may be procured by filing with the Secretary of State a certificate of any two of its last acting officers or other officers to be elected as provided in subsection (h) of this section, duly sworn or affirmed to by such officers before any person authorized by the laws of this State to administer oath or affirmations. The certificate shall

not be executed by any officer and his assistance officer, as for instance a secretary and an assistant secretary, and the two officers executing the certificate shall not be one and the same person.

(c) The certificate prescribed in subsection (b) of this section shall state—

(1) The name of the corporation, which name shall be the existing name of the corporation or the name it bore when its charter expired, except as otherwise provided in subsection (f) of this section;

(2) The name of the city, town or place within the county in which its principal office or place of business is located in this State and the name of its resident agent and, in towns or cities of over 6000 inhabitants, the street and number of its principal office or place of business and its resident agent;

(3) Whether or not the renewal, restoration or revival is to be perpetual and if not perpetual the time for which the renewal, restoration or revival is to continue and, in case of renewal before the expiration of the time limited for its existence, the date when the renewal is to commence, which shall be prior to the date of the expiration of the old charter which it is desired to renew;

(4) That the corporation desiring to be renewed or revived and so renewing or reviving its charter was duly organized under the laws of this State;

(5) The date when the charter of the corporation would expire, if such is the case, or such other facts as may show that the charter

has become inoperative or void or that the validity of any renewal has been brought into question;

(6) That the certificate for renewal or revival is filed by authority of those who were directors or managers of the corporation at the time its charter expired or who were elected directors or managers of the corporation as provided in subsection (h) of this section.

(d) The certificate shall be filed in the office of the Secretary of State, who shall furnish a certified copy of the same under his hand and seal of office. The certified copy shall be recorded in the office of the recorder of the county in which the principal office of the corporation is located in this State, in a book kept for the purposes. The certificate or a certified copy thereof duly certified under the hand of the Secretary of State and his seal of office accompanied with the certificate of the recorder of the county wherein the same is recorded under his hand and seal of office, stating that it has been recorded, the record of the same in the office of the recorder, or a copy of the record duly certified by the recorder, or the record of the certified copy recorded in the recorder's office, shall be evidence in all courts of this State.

(e) Upon the recording of the certificate the corporation shall be renewed and revived with the same force and effect as if its charter has not become inoperative and void or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the

corporation, its officers and agents during the time when its charter was inoperative or void or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its charter became inoperative or void, or expired by limitation and which were not disposed of prior to the time of its revival or renewal shall be vested in the corporations, after its revival and renewal, as fully and amply as they were held by the corporation at and before the time its charter became inoperative or void or expired by limitation, and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its charter had at all times remained in full force and effect."

. . . (Other sections not pertinent.)

Section 2101(c), Title 28, U. S. Codes, as follows:

"§2101. Supreme Court; time for appeal or certiorari; docketing; stay:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

BRIEF STATEMENT OF THE CASE

This is a petition for certiorari to review an order of the Court of Appeals dismissing the appeal of the F. P. Newport Corpration, Ltd., as a "purported appeal" because the trustee in bankruptcy, having failed to pay and continuing to fail and refusing to pay the franchise taxes of the State of Delaware (allowed in bankruptcy with ample funds in his possession), its charter was declared void April 1, 1937 by the State of Delaware. Such declaration of invalidity under Delware is only conditional.

Proceedings in bankruptcy were commenced against the corporation two years prior to 1937 when the corporation's Delaware Franchise taxes were not in default.

The State of Delaware itself has provided that any corporation, whose taxes are in default, nevertheless continues to exist with respect to any action, suit, or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution ". . . and until any judgments, orders or decrees therein shall be fully executed." (Sec. 42 Revised Code of Delaware, Ch. 65 as amended in 1941, Ch. 132 Sec. 11; 8 Del. Code 278).

"Bankruptcy" is an an action, suit, and proceeding within the above Statute, and until all its proceedings are concluded we maintain that the corporation exists. Also certain circuits of the federal courts in interpreting Delaware law have held that corporations whose

charters have been declared void for non-payment of taxes continue:

1. For proceedings under Section 77B of the Bankruptcy Act seven years after the charter lapsed.

Watts v. Liberty Royalties Corporation (10th Circuit, 106 Fed. (2) 941, 944.

2. For criminal prosecutions. The Court's opinion specifically includes "bankruptcy" as being extended.

U. S. v. P. F. Collier & Son Corp., 208 Fed. (2) 936 (7th Cir.).

3. For tax cases.

Bahen and Wright v. Commissioner, 176 Fed. (2) 538, 539 (4th Circuit).

The State of Delaware itself, while declaring the charter "void" for non-payment of taxes, really says it is really only voidable, because by Section 312 of Title 8 of Delaware Code it says that the corporation may be reinstated upon the payment of its delinquent taxes during the period it was in existence to the date it was declared "void" and thus it would be reinstated and "such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when its charter was inoperative or void, or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect."

Thus if the trustee had paid the claim of the State of Delaware (Claim 32, allowed) or would still pay it, the charter of the corporation would be reinstated and all its acts valided in any event.

Petitioner has made a demand on the trustee to pay the Franchise tax of the State of Delaware, but the trustee has refused and failed to do so.

The trustee should not be allowed, by his failure or refusal to act, to deprive the corporation of its right to appeal and should be estopped from doing so, under equitable principles which govern bankruptcy.

The trustee, with the permission of the District Court of the United States has at all times operated the F. P. Newport Corporation as a going concern. He has paid California franchise taxes throughout this period until 1952 when he determined to petition the Court to sell its assets, out of which he paid off or settled almost $2,000,000 indebtedness, leaving only $187,000 of unsecured claims to be paid.

Can he now deprive the corporation of substantial rights of appeal and a possible reversionary right of perhaps more than a quarter of a million dollars, depending on the outcome of the appeal, by his failure and refusal to pay the taxes of the State of Delaware?

Important questions of bankruptcy law not heretofore decided by this Court and a conflict in the circuits which should be resolved by this Court are urged as grounds for certiorari.

Another important question is whether the Circuit Court erred in denying appellant's motion to remand the case for fraud upon the District Court where that Court set upon conditions of the sale to a "qualified buyer" and it was misrepresented to the Court that the buyer "R. T. Colter and his wife, Robbie Colter" were the buyers, when they were not, but rather a "syndicate" was buying it, whose membership were unknown and not disclosed to the Court below.

Other important questions in bankruptcy, as set out in our questions presented, remain undetermined by this appeal, unless certiorari is granted and the orders of the Court below are reversed.

The F. P. Newport Corporation was a firm holding and conducting large real estate operations mostly in the County of Los Angeles, State of California, including valuable real estate subdivision property and valuable oil bearing properties, and certain properties in Tulare County, California, in its holdings.

On March 13th, 1935, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of California (R. 604) against the F. P. Newport Corporation, a Delaware Corporation, whose taxes were then fully paid up in Delaware. At that time the corporation owed about two million dollars, which it was unable to pay then, having been hit hard by the depression of 1933. The case was set down for jury trial on the involuntary petition, and on January 12th, 1937 an adjudication in bankruptcy was entered by consent of the bankrupt,

or an officer thereof. Every since March 13th, 1935, the estate of the bankrupt has been continuously administered in the United States District Court. (R. 604).

The United States District Court gave the corporation and the Trustee for the corporation consent to carry on business as a going concern. Throughout this entire period (from 1935 until 1952) the corporation paid corporation franchise tax to the franchise tax commissioner of the State of California. The corporation was a Delaware corporation and the tax commissioner of the State of Delaware was notified of the bankruptcy proceedings, and he thereupon proceeded to file a claim for the Delaware state taxes with the Trustee. (Claim 32).

The corporation continued under the bankruptcy act and with the consent of the Court to do business and has done so successfully and profitably, and it has met its various obligations. The tax claim of the State of Delaware was allowed in the bankruptcy court but it was not paid by the Trustee, but is among the claims to be paid out of the sale of the assets. (R. 634—Claim No. 32) or otherwise out of funds in the possession of the Trustee.

On April 1st, 1937, the State of Delaware forfeited the corporate charter of the Newport Corporation for nonpayment of Delaware taxes. (R. 639). The corporation, nevertheless, continued to be operated by the Trustee under the authority granted to it by the United States District Court, Southern District of California, Central Division, and has continued to pay its Cali-

fornia state franchise tax until 1952. Furthermore, in 1941, and at other times the bankrupt corporation was by the said trustee asked to join in, and did join in, to the entering of leases for oil drilling on its valuable properties in the Long Beach, California, area, and signed through its officers and joined in the leases made by the Trustee; thus, the Trustee acknowledging that the corporation had certain rights and was functioning also.

At until shortly before the time of the original bankruptcy proceeding, the corporation was represented by William H. Neblett, attorney-at-law. After the resignation of Neblett the corporation was subsequently represented by L. M. Cahill, Esq. (R. 684). Since that time, Mr. Neblett has represented R. T. Colter, the purported purchaser of the assets of the F. P. Newport Corporation, Ltd., and has aided the trustee in every way to oust his former client, the F. P. Newport Corporation, Ltd., from its right of appeal. (R. 683-695).

Through the years of its operation as a going concern, the Newport Corporation has succeeded in disposing of and clearing up debts amounting to close to two million dollars. The total unsecured claims as of October 7, 1954 were only $187,906.84. (R. 635).

On April 14th, 1952, Paul W. Sampsell, the Trustee in Bankruptcy, filed his verified petition to liquidate the assets of the F. P. Newport Corporation, Ltd. It also asserted it had a bid from R. T. Colter to purchase the assets for $350,565.15 cash upon confirmation of

the sale. (R. 611). One advertisement was inserted in the Los Angeles Times and one advertisement was inserted in the Los Angeles Examiner regarding the proposed sale. The proposed purchase was conditional upon the purchaser receiving back from the trustee all the moneys collected or deposited from the sale of oil. Judge McCormick rejected this proposed bid on February 9th, 1954, and re-referred the matter to the Referee in Bankruptcy "for the purpose of conducting a further formal hearing in court, pursuant to the Bankruptcy Act, and in such manner as to his judgment and discretion shall warrant, and if possible obtaining a firm, definite, positive, certain bid for the property of the bankrupt estate." This in our opinion constitutes a rejection of the bid and required new notice and new bidding. In the meantime, the corporation and petitioner proposed a Plan of Arrangement under Chapter X of the Bankruptcy Act and for reorganization of the corporation. Petition for reorganization was filed in the United States District Court on January 19th, 1954. No hearing was held on the petition for the proposed plan of the corporation, but on April 20th, 1954, another District Judge without notice to the petitioner or a hearing thereon directed the Clerk to enter a dismissal of the petition for noncompliance of local rule 218(b) which requires application for the approval of this petition within ten days.

During the pendency of this petition, on March 15th, 1954, the trustee filed his amended and supplemental petition for authority to sell the real and per-

sonal property and for confirmation of the proposed sale of real and personal property to R. T. Colter and Robbie Colter, his wife, as joint tenants. They proposed the purchase of the assets for $350,564.15. The date for the hearing was not advertised in any daily newspaper, but a single ad giving legal descriptions of the properties involved was published in the Los Angeles Daily Journal (a newspaper with a circulation of about 4000 copies and devoted to the interests of lawyers and judges and circulating among courts and lawyers). No further advertisement or publicity was given to the proposed new sale.

In these new proceedings, Attorney William H. Neblett stated he was now representing the Colters.

Hearings were set on the amended and supplemental petition before Reuben G. Hunt, a Referee in Bankruptcy, on April 7th, 8th and 9th, 1954, and the reports thereof are covered in the reporter's transcript of the first four volumes forwarded to this Court. During these proceedings and in the District Court (before another judge than Judge McCormick, who referred back the final bid), the objections of the bankrupt were heard and considered on their merits.

During the course of the hearings, there was a request made, concurred in by the trustee that the proposed purchasers qualify financially as to their ability to make the deal and purchase themselves.

R. T. Colter is a man 82-years old, suffering from cancer and was operated on for a brain tumor. It was

later stated that his physical condition was such that he was not able to and is not able to carry on business activities. (R. 653). It was a condition of the sale that each of the buyers personally qualify as to their financial ability and otherwise to see the deal through. It was represented to the Referee and the District Court that Mr. and Mrs. Colter had the money themselves and intended to make the purchase themselves. F. P. Newport, the President of the F. P. Newport Corporation, discovered after the confirmation of the sale that Colter did not intend to go through with the deal himself and was out of the deal, and that actually the deal was being worked through Mr. Neblett by a syndicate of buyers. The corporation thereupon made a motion to remand the case to the United States District Court for further proceedings to determine the facts as to whether a fraud had been perpetrated on the Court (R. 614, *et seq.*). In an affidavit in opposition to the motion, Wm. H. Neblett impliciting admitted that Colter was not the buyer, stating that Mr. Colter instructed Neblett to help him put together another "syndicate" to purchase the bankrupt estate, pursuant to the order of liquidation. (R. 688). Such a syndicate is not a "purchase by Colter."

Other individual bidders qualified personally as to their assets being in excess of a million dollars. Following the hearings of April 6th, 7th, 8th and 9th, 1954, the purported bid of "R. T. Colter and Robbie E. Colter, his wife, as joint tenants," for $407,000.00 cash on confirmation by the Court was approved by the Ref-

eree. Hearing on most of the claims of the creditors did not come up until 1952, at which time they were first allowed and approved. Although some of the claimants had not filed any claim for interest, the Referee nevertheless allowed them interest from the date of the commencement of the bankruptcy proceedings in 1935, thus adding approximately 135% to each of the claimants' claim by reason of the interest allowed at the rate of 7% per annum on each of the claims for a period of 19-years. This allowance of interest, without any claim therefor by many claimants, would wipe out a substantial reversionary right in the bankrupt corporation as resulting *cestui que* trust.

The referee in the bankruptcy court in Finding XVI allowed interest on all claims—a total of $250,-913.59 from the beginning—a period of about 19 years interest. The district judge affirmed and his opinion reaffirms the allowance of interest specifically (123 Fed. Sup. 95) as found by the referee.

The orders of the referees came on for review before the United States District Judge who affirmed his order of sale to the Colters, and upheld his allowance of interest (R. 618, 627) in full and from the beginning of bankruptcy.

No case was cited to the new District Judge or by the District Judge wherein interest has ever been allowed in a proceeding in bankruptcy which commenced as an involuntary proceeding and was acted upon as such in that manner, and from such date.

An appeal was duly and regularly taken to the United States Court of Appeals for the Ninth Circuit and during the pendency thereof, a motion was made in the District Court to dismiss the appeal because the Newport Corporation's charter had lapsed in 1937. The District Court denied the motion. No appeal was taken from the denial of the motion in the District Court. The motion was again renewed in the United States Court of Appeals upon the docketing of the record in that Court. (R. 598). Thus, although the corporation has been doing business under the authority of the bankruptcy court for a period of 19-years and paid its franchise tax in the State of California, and although the Referee in Bankruptcy held lengthy hearings and the District Court reviewed the matters handled by the Referee on its merits, the Court of Appeals nevertheless held that the F. P. Newport Corporation had no right to appeal and that the *purported* appeal should therefore be dismissed. It also denied appellant's motions to remand the case because of a fraud perpetrated on the Bankruptcy Court by the purported purchaser.

It was conceded in the oral orgument on appeal before the Court of Appeals that if the District Court improperly allowed interest on all of the claims dating back to 1935, that the F. P. Newport Corporation would be solvent and not bankrupt, and would receive a substantial sum of money in excess of $200,000 from the proceeds of the sale, even if the sale itself was allowed to go through.

The assets of the F. P. Newport Corporation were appraised by a court appointed appraiser as being in

excess of $600,000.00 in value, and by F. P. Newport (himself a veteran real estate man and appraiser) at in excess of $800,000.00. The sale price on the confirmation was only half of the latter.

One of the reasons attributed to the low price of the sale was that the Referee ordered the sale of all the estate in bulk rather than segregating the properties and selling them separately. Part of the properties were potential real estate developments; other parts of the property were oil bearing properties. There was no relationship between the two, nor any reason why they should have been sold together.

The claim of the State of Delaware as a preferred claim has been allowed by the Referee in Bankruptcy (see also Appendix) (Claim 32).

The Trustee in Bankruptcy is presently in possession of cash assets in excess of $40,000.00 from which he could pay up the Delaware taxes and reinstate the corporation to all its rights if the sale of the assets are approved he will receive enough to pay the franchise tax in full, which has been approved as a preferred claim, and thus under Delaware Law all of its acts will have become valid and validated pursuant to Section 312 and 510 of the Delaware Corporation Act. The Trustee certainly should not be permitted to prevent the appellant from appealing by reason of his retention of the monies and his failure to pay the Delaware corporation franchise taxes, and thus validly reinstate the corporation in full. See Section 312 and Section 510 of the Delaware Corporation Code.

The Trustee has the duty to protect the resulting beneficiary, the bankrupt in this case, as resulting *cestui que trust.* There is a want of equity in his deliberate failure to do so.

QUESTIONS PRESENTED BY THIS WRIT

(1) Whether the appellant, the F. P. Newport Corporation, Ltd., which would have a substantial reversionary right ($200,000 or more) from the sale of the assets of the F. P. Newport Corporation and is a resulting *cesti que* trust, has a right to appeal where it has been doing business at all times under the permission of the United States District Court and has been operating under a franchise tax within the State of California although its original charter of the State of Delaware was declared void (conditionally) for nonpayment of taxes on April 1st, 1937, two years after the commencement of bankruptcy proceedings, and where its charter could be reinstated immediately and all its past acts validated under Title 8, Section 312, Delaware Corporation Code if the trustee in the performance of his required duty would pay the Delaware delinquent taxes.

(2) Whether under the Delaware Corporation Statutes as interpreted by the State of Delaware itself the F. P. Newport Corporation continued to exist as a matter of law after bankruptcy as a "proceeding" within the meaning of Delaware Corporation Law allowing the corporation to continue until all decrees are executed.

(3) Whether in any event a corporation acting either *de jure* or *de facto* and subject to receive a large sum of money if its contentions on appeal are upheld, has a right to appeal from the orders of the United States District Court which considered and heard his rights and claims on the merits and ruled against them upon four days of trial before the referee.

(4) Whether the Trustee in Bankruptcy who has ample funds on hand, has a duty to pay up all delinquent taxes of the State of Delaware and thus under Delaware Law reinstate the corporation to all its rights and confirm all its acts from the time its charter was declared void. Whether by his failure to do so there is a want of equity on the part of the Trustee and he is estopped to assert himself against his resulting *cestui que* trust, the bankrupt, on this ground, and thus deny the bankrupt his right of appeal.

(5) Whether the United States Court of Appeals erred in failing to remand the case for fraud committed upon the District Court, where it is shown and not controverted that the purported buyer did not qualify, as required in the District Court, as a qualified buyer, and where it was misrepresented to the District Court that he was the actual purchaser.

(6) Whether the District Court erred in allowing interest at 7% from the date of the involuntary proceedings in bankruptcy, or in ordering the unsecured creditors paid 135% interest, approximately one and one-third more than their original indebtedness where there was no claim therefor.

(7) Whether the Chandler Act of 1938 allows interest in an involuntary proceeding in bankruptcy to the unsecured creditors from the date when the involuntary proceedings were first filed, and whether that interest is allowable at the rate of 7% per annum.

(8) Whether interest is allowable if no claim for interest is filed.

(9) Whether interest if claimed and allowed, is only from date of allowance of claim (May, 1952) and not date of commencement of proceedings, 1935.

(10) Whether the District Court erred in holding that there had been adequate notice and publication of the proposed sales of the assets, such as would bring buyers who would give more than fifty per cent, or seventy-five per cent, of the appraised value of the properties.

(11) Whether the Court erred in holding that the properties, which were a mixture of real estate development and oil bearing properties and possible cotton land, should be sold together, or in bulk.

(12) Whether the referee had jurisdiction to consider a sale on an amended petition without treating it as a new proceeding with new notice to creditors of a new sale, and new and adequate advertising.

(13) Whether the Court erred in summarily dismissing the proceedings under Chapter X of the Bankruptcy Act without setting the same down for hearing and giving the parties an opportunity to set forth a

plan, and have the same considered by the creditors and all of the parties. Whether a local rule of court may supplant the plain requirements of Chapter X of the Bankruptcy Act.

(14) Whether a sale to a proposed purchaser through an attorney who formerly represented the corporation was such an adverse interest on its face as to vitiate the sale.

REASONS FOR ALLOWING THE WRIT

I.

(1) The writ should be allowed as presenting important questions of bankruptcy law never heretofore decided by the Supreme Court of the United States and important in the general administration of involuntary bankruptcy and corporate affairs. (2) There is a conflict between the Circuit Courts on some of the important questions involved.

> *Manufacturers Trust Co. v. Becker,* 337 U.S. 923, 93 L.Ed. 1731; and 338 U.S. 304, 94 L.Ed. 107, 111.

Here the corporation continued to exist for 19 years and do business as a going concern throughout the years, under the authority of the United States District Court. At no time was its powers or its functions held to be inadequate to continue throughout the years, but its vitality was considered of sufficient importance to

get it to join with the trustee in the making of valuable oil leases in Long Beach area.

This Court said, in a footnote, in *Manufacturers Trust Co. v. Becker,* 338 U.S. 304, at 312, 94 L.Ed. 114:

> "Courts of equity, in defining the responsibility of officers of a corporation which is insolvent and yet a going concern, have frequently assigned greater importance to the corporation's vitality than to its insolvency. E.g., *Sanford Fork & Tool Co. v. Howe, Brown & Co.,* 157 U.S. 312, 39 L.Ed 713, 15 S. Ct. 621 (1895); *White, Potter & Paige Mfg. Co. v. Henry B. Petters Importing Co.,* 30 F. 864."

So, here, throughout the proceedings, the District Court treated the company as a going concern; the Trustee paid its California franchise tax through 1952; he neglected to pay the Delaware tax, although the State of Delaware did file its claim with the Court and that claim was allowed (Claim 32) and he has had and has ample funds to pay these taxes, the effect of which would be to confirm all acts of the corporation done from the date of the expiration of the charter for non-payment of taxes. 8 Del. Code Ann. Sec. 312.

Under these circumstances the trustee who came into the District Court and had four days of hearings on confirmation of the sale and a review by the United States District Judge on the theory that it was a going concern and its assets should now be sold, and in which the appellant fully participated in the proceedings on its merits, should not now be heard to say that the rights

of appeal guaranteed by Section 24 of the Bankruptcy Act do not apply in the Court of Appeals and this Court. Congress has specifically authorized reviews from matters of sale and orders approving this in courts of bankruptcy, and has granted appellate jurisdiction in the form and manner of an appeal. (Section 24 of the Bankrupt Act).

Here the appellant has a substantial financial interest in the successful outcome of the appeal. If it should be held on one point alone—namely the question of interest, that interest was improperly awarded to the clamants at the rate of approximately 135% interest on each of the unsecured claims, then the appellant woud have a very substantial equity and reversionary right in the monies of the sale if the sale itself is confirmed at an adequate price ($200,000 or better).

Again, if the Court should hold that the sale was not properly advertised and that a proper advertisement would bring a much higher price and more bidders, rebidding and resale of the properties would again bring valuable results to the appellant herein.

Also, if the Court should hold that it was improper to sell all of the mixed assets(real estate development and oil lands) in one package and in bulk, and that the referee erred therein, the appellant would benefit by individual sales, which could result in a much higher sum being received than that obtained from the bulk sale.

These are only among some of the questions in which the appellant has a substantial interest on appeal.

The appellant has been acting as a *de facto* corporation, if not a *de jure* corporation, and was at all times considered by the Trial Court and District Court as in existence, and we submit that Congress intended it to have a right of appeal in this matter, and that its appeal should not have been summarily dismissed.

In this view of the situation, the Federal Bankruptcy Act superseded the laws of the State of Delaware. The involuntary proceedings against the appellant were commenced in 1935. At that time this corporation was in good standing in the State of Delaware. Delaware law recognizes the continuance of the corporation thereafter. All matters in bankruptcy date from the date of the filing of the petition in bankruptcy.

But, even under the laws of the State of Delaware, the case of the Ninth Circuit is definitely in conflict with the decisions of several circuits. In the Seventh Circuit in *United States v. P. F. Collier & Son Corporation,* 208 Fed. 2d 936, and the Court of Appeals for the Fourth Circuit in *Baker & Wright, Inc. v. Commissioner,* 176 Fed. 2d 538, it is held that a Delaware Corporation continues after dissolution after the three-year period from such expiration for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business; to dispose of and convey their property and to divide their capital stock, in respect to any action, suit, or proceeding begun or commenced by or against the corporation within three years after the

date of such expiration or dissolution, and until any judgments, orders, or decrees shall be fully executed. (Section 2074, Revised Code of Delaware of 1935, Chapter 65, as amended in 1941, Chapter 132, Sec. 11, 8 Delaware Code 278).

In the *Collier* case the Seventh Circuit held that the words "any action, suit or proceeding" as used in the Delaware statute embrace "all forms of litigation, civil, criminal, *bankruptcy*, and admiralty." "The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on legislative intent." The Court, in that case, held that the dissolved Delaware corporation was still subject to criminal prosecution under the Fair Labor Standard Act of 1938, as amended, 29 U.S.C.A. §201. (208 Fed. 2d 936, 937.)

And, the Court of Appeals for the Fourth Circuit, in *Bahen & Wright, Inc. v. Commissioner*, 176 Fed. 2d 538, at 539, said:

> "The Delaware statute explicitly provides for continued corporate existence for as long as may be necessary to reach a final determination of any 'proceeding' as well as any 'action or suit' begun by or against the corporation within three years of its dissolution. The word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the statute."

From the date of commencement of bankruptcy "proceedings" commenced. Section 22 of the Bankruptcy Act, Title 11, Chapter 4, Section 45, says:

"The judge may at any stage of a *proceeding* under this title refer the same to a referee, either generally or specially."

Section 23 of the Bankruptcy Act, Title 11, Chapter 4, Section 46, says:

"The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from *proceedings* under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired," etc.

Section 24 of the Bankruptcy, (U. S. Code, Title 11, Chap. 4, Sec. 47) says:

"The [Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia], United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in these respective jurisdictions in *proceedings* in bankruptcy, either interlocutory or final, and in controversies arising in *proceedings* in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact," etc.

Thus, the Delaware statute, by its very terms, encompasses the right of a corporation in good standing at the time the *proceedings* in bankruptcy commenced to continue such bankruptcy in all its phases, with all its attendant rights of appeal and review.

The Tenth Circuit in *Watts v. Liberty Royalties Corporation,* 106 F. (2) 941, 944, also held that a proceeding under 77 B in Bankruptcy could take place seven years after the charter was declared void.

The laws of Delaware, therefore, expressly permit the continuance of bankruptcy proceedings to their conclusion; and until the conclusion thereof; and the decision of the Court of Appeals for the Ninth Circuit, in dismissing the appeal, is in conflict with the decisions of the Seventh, Fourth and Tenth Circuits. This Court should grant certiorari also to resolve the conflict between the circuits, as to the meaning and existence of a corporation for the purposes of determining the rights of the parties.

Furthermore, this Court in *Defense Supplies Corporation v. Lawrence Warehouse Company,* 336 U. S. 631, 634, 635, 93 L.Ed. 931, held that this Court in its supervisory powers, even of a dissolved corporation, had the right to consider the matters on appeal to resolve them properly even though the Defense Supplies Corporation had been dissolved by an Act of Congress.

Since Bankruptcy proceedings proceed upon equitable principles, it would be highly inequitable to deny the bankrupt, who has a substantial interest in the review of the decision on appeal, the right to have this Court determine the correctness of the decisions below.

Furthermore, Section 1 (8) of the Bankruptcy Act defines a "corporation" as follows:

"A corporation shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include partnership associations organized under laws making the capital subcribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees, or when beneficial interest or ownership is evidenced by a certificate or other written instrument."

The trustee conducted the business of the F. P. Newport Corporation; one of the oil leases for Newport Corporation property was evidenced by a written instrument joined in by the F. P. Newport Corporation, Ltd. and its president F. P. Newport who joined with the trustee in the lease agreements.

In any event, the corporation operating with the consent of the Court was, in fact a *de facto* corporation.

It must be borne in mind that the proceedings commenced against the Newport Corporation were involuntary proceedings in bankruptcy. Even after dissolution of an involuntary corporation, it has been held that a corporation is considered alive in order to carry out the fundamental bankruptcy purpose, and thus enable the corporation to wind up its affairs.

In re Peer Manor Building Corporation, 143 Fed. 2d 769.

The court should vote to whether the corporation, though technically insolvent, is a going concern.

Sanford Fork and Tone Co. v. Howe, Brown and Co., 157 U. S. 312;
Ashville Lumber Co. v. Hyde, 172 F. 730.

Furthermore, Delaware cases have held that even under its own statute the word "void" as used therein does not mean void in the strict sense of the word, for by the payment of taxes the corporation is immediately restored to good standing in that state. Thus the word "void" in the Delaware Statute is only conditional.

Nevertheless, the corporation without the payment of taxes continued to function in the State of California throughout the years, paying its special taxes there.

This case further involves an important question as to Whether Federal Law or State Law would Govern the Right to Appeal in a Bankruptcy Case.

If the case could be dismissed because of the franchise tax commissioner's need for money in the State of Delaware, it would in effect be a holding that state law and not federal law would govern the rights of appeal in bankruptcy proceedings.

Since the corporation was in good standing as far as the State of Delaware was concerned at the time the proceedings in bankruptcy were commenced against it by filing of an involuntary petition, under the laws of Delaware (Revenue Code 1935, Section 2074, *et seq.* as amended in 1941), its right to carry out all of the proceedings in bankruptcy continued throughout.

Revenue Code, Section 35—Section 2071 of the Delaware Corporation Code is but an expension of the equitable doctrine that the properties of the corporation that does not pay its franchise tax does not escheat to the state, or revert, but will be administered completely for the purpose of winding up.

Addy v. Short, 89 Atl. A (2), page 136;
Bahen v. Wright, 176 Fed. 2d 538.

That this has also been the holding of the Federal courts in other circuits is shown by the case of Watts v. Liberty Royalties Corporation (10th Circ.) 106 Fed. 2d 941, 944. In that case the Tenth Circuit held that even though more than three years had elapsed after the payment of its franchise tax a petition under Section 77B of the Bankruptcy Act for reorganization would lie to carry out these purposes. Thus, the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decision of the Tenth Circuit, and the holding of the Fourth Circuit in Bahen v. Wright 176 Fed. 2d 538, and the Seventh Circuit in United States v. P. F. Collier & Son Corporation, 208 Fed. 2d 936.

This Court should, therefore, grant a hearing to resolve the conflict in the circuits.

The Ninth Circuit Court apparently took the position that a corporation whose charter had lapsed for nonpayment of taxes was dead and could not do anything, basing it on a decision which this Court rendered in an Illinois case; but, the Court in *Watts v. Liberty*

Royalties Corporation, 106 Fed. 2d 944, (10th Cir.) distinguished that case from the Illinois case in pointing out that the Delaware law permits a revival of the corporation and all its powers by an application to be restored and the payment of taxes. Its corporation charter can be fully restored under Sections 312 and 510 of the Delaware Corporation Code relating to taxes, and see Title 8, Delaware Corporation Statute, Section 312.

See:

Watts v. Liberty Royalties Corporation, 106 Fed. 2d at 944.

This holding is in accordance with the cases decided by the State of Delaware itself which hold that a Delaware corporation is not actually dead because there has been a nonpayment of taxes, but that the charter is merely in a state of suspension which can be renewed at any time by the appropriate payment of delinquent taxes. (See Section 312, Delaware Corporation Code; *Wax v. Riverview Cemetery Co.,* 2 Terry 424, 41 Del. 424, 24 Atl. 431). The Delaware Court points out that the franchise tax is purely a revenue measure, and that the corporation can be resuscitated upon the payment of the taxes. The provisions of the Delaware statute permitting its reinstatement are purely remedial.

See also the following Delaware cases:

Harned v. Beacon Hill Real Estate Co., 9 Del. ch. 411, 84 A. 229;

Eastman, Gardiner & Co. v. Warren, 109 Fed. 2d 193 (5th Circ.).

In *Watts v. Liberty Royalties Corporation,* (10th Circ.) 106 Fed. 2d 944, the court allowed the bankrupt to proceed under Section 77B of the Bankruptcy Act, after more than three years after its charter had expired. This holding is in consonance with the purposes of the Bankruptcy Act to give full and exclusive jurisdiction to the Bankruptcy Court in the administration of bankruptcy estate and this, of course, includes the right to appeal and have its orders reviewed by the Court of Appeals and by this Court. Any other holding would destroy that right. See also *Troustone v. Bauer, Pogue & Co.,* 144 Fed. 2d 382.

In the case of *Watts v. Liberty Royalties Corporation* (10th Circ), 106 Fed. 2d 941, *seven* years had elapsed from the payment of taxes, yet that circuit permitted the corporation to proceed for re-organization under Section 77B of the Bankruptcy Act.

The equitable purposes of the Bankruptcy Act would be frustrated if a corporation whose assets had been taken over by the Trustee in Bankruptcy pursuant to that act could not proceed to be administered in the Bankruptcy Court because the Trustee failed or neglected to pay the state taxes of the state in which the corporation was chartered. Thus, in this case he could frustrate, and the effect is to frustrate, the rights of the corporation, one of his beneficiaries as resulting *cestui que* trust.

And, since all rights date from the date of bankruptcy and the Newport Corporation's tax situation in Delaware was valid as of the date of its adjudication in

bankruptcy, the bankruptcy is a proceeding within the meaning of the Delaware statute in which "all matters therein, until its conclusion, are necessarily exempted" under the provisions of the Delaware statute.

United States v. P. F. Collier & Son Corp., 208 Fed. 2d 936.

We respectfully submit that this is not only a highly important question in the law of Bankruptcy and corporate operations but also there is a conflict in the Circuits (between the Ninth Circuit and that of the Tenth Circuit, Fourth Circuit and the Seventh Circuit) which should be resolved by this Honorable Court.

II.

Another highly important question presented by this Writ is Whether the District Court Erred in Allowing Interest on all the Unsecured Claims from the date of the Commencement of Bankruptcy in 1935.

The amount of generally allowed claims against the bankrupt estate is $187,906.84. These claims were not passed upon nor allowed until 1952; yet the Referee allowed seven per cent interest per annum on these claims from the date of the bankruptcy in 1935—or $250,913.59.

The Chandler Act made no provision for the allowance of interest. The general rule has been that interest stops when bankruptcy commences. Congress, in advising and considering the Bankruptcy Act, had a

right to provide for or not to provide for interest, and Congress has made no provision in the Bankruptcy Act for any interest. Even in the case of the Government in tax claims, this Court has stated in a Bankruptcy proceeding, in *New York v. Saper*, that interest would not be allowed to the Government:

In *New York v. Saper*, 336 U. S. 328, 330, 93 L.Ed. 710, at 714, the Court said:

> "More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. *Sexton v. Dreyfus*, 219 U.S. 339, 344, 55 L.Ed. 244, 245, 31 S. Ct. 256, 25 Am. Bankr. 363. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. Section 63(a) (1), 11 USCA §101(a) (1), 3 FCA Title 11, §103(a) (1) allows interest on judgments and written instruments only to date of bankruptcy. Section 63(a) (5), 11 USCA §103(a) (5), 3 FCA Title 11, §103(a) (5) allows interest only to that date on debts reduced to judgments after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57 (j) 11 USCA §93 (j), 3 FCA Title 11, §93 (j) forbidding allowance of governmental pen-

alties or forfeitures, permits allowance of losses sustained by the act penalized, with actual costs and 'such interest as may have accrued thereon according to law.' However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified. Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as to bankruptcy. Section 57 (n), 11USCA §93 (n), 3 FCA Title 11, §93 (n), requiring governmental claims to be provided in the same manner and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, §64 (a), 11 PSCA §104 (a), 3 FCA Title 11, §104 (a), and the provision making taxes nondischargeable, §17, 11 USCA §35, 3 FCA Title 11, §35. But each of these sections is silent as to interest.

The long-standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so. However, the issue comes here after forty years of bankruptcy administration under the Act of 1898 followed by ten years under the 1938 Chandler Amendments."

(336 U. S. 328, 330, 331, 332, 93 L.ed. 710, 714, 715).

The holding of the District Court is therefore in conflict with the decisions of this Court on the question of payment of interest, and also with *In re Silk* (2nd Circuit), 55 Fed. 2d 917; *Burton Coal Co. v. Franklin Coal Co.* (8th Circuit) 67 Fed. 2d 797.

No case has been cited, nor can be found, where an involuntary petition in bankruptcy brought against it by its creditors, permitted them thereafter to collect interest, after the corporation had been kept alive as a going concern and its obligations by reason thereof have been, and are being, met 100% on the dollar. A proceeding which would allow the creditors to collect 135% interest and deprive the corporation which has operated there 19 years to the successful tune of liquidating almost two million dollars of indebtedness of receiving anything as resulting *cestui que* trust would be inequitable and contrary to any Congressional intent or purpose.

But, even if interest would be allowable, it could only be allowable from May 1952, the date when claims first came up for and were passed upon. Until that date each claim was uncertain and undecided; it was subject to objections, and none of the claimants pressed their claim, nor were there hearings held thereon. A decision on a claim is a judicial act and the determination of its validity only makes it a judgment in the sense that interest may be paid on judgments after they are rendered and the amounts made fixed and certain in cases where interest is allowable.

Congress, however, has stated how claims should be filed; and, before any interest could be allowed on any claim, the claimant would have to make a claim for interest—none of which was done here. Thus, the Court by judicial fiat has granted an amount beyond that claimed by the claimants. Congress has not so provided. This would, in effect, be a penalty in an involuntary bankruptcy proceeding, which this Court has said is not appropriate. And see

Vanston Bondholders Protec. Com. v. Green, 329 N.S. 156, 163; 91 L.Ed. 166.

In *Vanston Bondholders Protec. Com. v. Green,* 329 U.S. 156, 163, 91 L.Ed. 166, the Court said:

> "But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles."

The Court there said:

> "When and under what circumstances federal courts allow interest on claims against debtors' estates being administered by them has long been decided by federal law. Cf. *Jackson County v. United States,* 308 U.S. 343, 84 L.ed. 313, 60 S. Ct. 285; *Royal Indem. Co. v. United States,* 313 U.S. 289, 85 L.ed. 1361, 61 S. Ct. 995. The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings. Exaction

of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. Thus this Court has said: 'We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.' *Thomas v. Western Car. Co.*, 149 U.S. 95, 116, 117, 37 L.ed. 663, 670, 671, 13 S. Ct. 824. Cf. *American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co.*, 233 U.S. 261, 58 L.ed. 949, 34 S. Ct. 502. Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay."

Congress, in fixing how claims shall be filed, has not provided for interest on unsecured claims, nor for payment of any amounts in excess of the claims. Where a claim is a secured claim, generally, the instrument itself provides for interest and the claimant files his claim pursuant to his secured instrument. But, here, all of the claims on which interest was allowed were, and are, unsecured claims and were not considered or allowed until May 1962. Yet the Court reverted inter-

est back to the date of the commencement in bankruptcy.

Even under state law, a claim or suit for money would not bear interest until reduced to a judgment. Therefore, in any event, the claims would not be entitled to interest equitably or otherwise until they had been reduced by a judicial act to a specified allowed amount. We think even this allowance, if it was to be had and on unsecured claims, was the problem of Congress and not the Court. In those few cases in which interest has been allowed the proceedings were voluntary bankruptcy proceedings and not involuntary, and not in any case where the corporation has been permitted to do business over a period of years by the District Court in order to enable the corporation or debtor to come out whole, as in this case. Any earlier liquidation woud have cut the claims of the creditors far below their receipt of 100 cents on the dollar.

This question is a very important question in the administration and interpretation of the bankruptcy law, which this Court should determine with finality by the granting of the writ of certiorari.

III.

The Third important point to be decided in the administration of Bankruptcy in connection with this appeal is Whether a Proposed Plan of Re-organization Under Chapter X, which is submitted to the District Court, may be Summarily, and Without Notice, Dismissed Under a Local Rule Without Being Passed Upon by the District Court in Accordance with the Provisions of Section 141 of the Bankruptcy Act, (11 U.S.C. §§541-549).

That section provides that upon the filing of the petition by a debtor, the judge shall enter an order approving the petition is satisfied that it complies with the requirements of this Chapter and has been filed in good faith, or dismissing it is not so satisfied. The Court did not dismiss the petition because it did not comply with the requirements of the chapter or was not filed in good faith, but dismissed it summarily and without notice to the debtor, and without a hearing thereon, because it did not comply with a local rule of the Bankruptcy Court. The plan was one that would have protected and benefitted the debtor corporation and its stockholders. The summary dismissal of the proposed plan thus allowed the specialized sale to proceed.

In *Re Equitable Office Building Corporation, Debtor*, 96 L.Ed. 1386, at 1390, Mr. Justice Reed stated:

> "A court of reorganization guards with equal solicitude the *equity of stockholders* and the priority of creditors." (Emphasis ours.)

Here, the summary dismissal of the Chapter X petition, without notice or without hearing, and without compliance of Section 141 of the Bankruptcy Act, deprived the equity of stockholders of that "equal solicitude" guaranteed by the Bankruptcy Act.

And, the allowance of interest from the date of bankruptcy equally failed to guard the equity of the stockholders in this case.

IV.

Another reason for granting the Writ is to determine the Important Question of Federal Law as to the Amount of Notice that Should Be Given upon the Sale of Properties of this Character.

We point out the factual situation briefly, we point up the importance of the question which was erroneously decided by the District Court and appeal summarily denied by the Court of Appeals.

After 19-years of operations as a going concern, with permission of the Court, (B.A. §202(a) (5), until May 26, 1952), an order of liquidation was entered by the Referee in Bankruptcy, Referee Dickson, which order was confirmed on review by Judge Paul J. McCormick, on November 28, 1952. The order of Referee Dickson directed the Trustee "to proceed with all due diligence to sell the assets of said estate to the end that the assets of said estate may be speedily converted into money, the expenses of administration paid, the residue paid to the creditors as required by law, and the estate

closed." This order was made after almost two million dollars in indebtedness had been paid off or cleared from the estate.

Trustees Metcalf and Sampsell respectively, engaged in the business of leasing oil properties, inspecting their operation and collecting various kinds of income therefrom. While operating that business, they paid federal and state income tax. (*U. S. v. Metcalf*, 131 Fed. 2d 677). On February 11th, 1953, A. S. Menick, an appraiser appointed by the Court, filed his appraisement and on September 21st, 1953, A. A. Carrey filed his appraisement of oil royalties out of the lands of the estate at Long Beach, and on November 17th, 1953, A. S. Menick and H. A. Sheedy filed their appraisement of a parcel of land in Tulare County and acreage in the Verdugo Woodlands Tract in the City of Glendale, and real estate in Long Beach, out of which the oil royalties arose. The total appraisement of these court appointed appraisers was $604,910.00. Mr. Newport, a real estate operator for many years, appraised the properties at $800,000.00.

On November 3, 1953, Trustee Sampsell filed his petition for authority to sell and for confirmation of sale of real and personal property to R. T. Colter, a married man, represented by Wm. Neblett, formerly the attorney for the Newport Corporation but now representing interest adverse to the corporation. Colter's bid was for $350,564.15. The petition prayed that the time and place be set for a hearing according to law, and that at the hearing an appraisement of all

real and personal properties be made and presented to the Court at the hearing thereof.

The offer of Mr. Colter was conditioned on his receiving all the oil and other income during the pendency of the proceedings and subsequent to the confirmation of the bid. The oil royalties alone are $3500.00 per month, or $42,000.00 annually. On May 26th, 1952 the trustee possessed $47,285,19 in oil royalties alone. Judge McCormick declined to confirm the bid, but instead referred the matter back to the referee as not being a firm bid within the meaning of the law and referred the matter to the referee to conduct further formal hearing and endeavor to procure a "firm, positive, definite and certain bid for the property pursuant to the Bankruptcy Act" and in such manner as to his judgment would be for the best interests of the estate. The order of Judge McCormick terminated the hearing on an effort to confirm the bid and it became a dead matter and required a new proceeding with new notice and new hearing as to the value of all the assets, special conditions attached, the possibility of paying off the obligations from monies already received, the possibility of Tulare County properties being cotton producing, the value of the Verdugos Woodland property as subdivision property.

The Referee, however, treated the matter as a continuing one, and without holding any hearings thereon, considered an amended bid by Colter, which written offer was as follows:

"R. T. Colter hereby amends his offer to purchase all of the properties, both real and personal, of F. P. Newport Corporation, Ltd., a bankrupt, which offer is the subject of the petition for confirmation of November 3rd, 1953. (Petition page 7, lines 11-15).

Several creditors filed their written objections. These objections were set forth in fifteen separately numbered paragraphs, which were overruled.

The Eighth Circuit, in *Bovay v. Townsend,* 78 Fed. 2d 343, lays down the rule: "We are of the opinion that the sole power of the court lay in either approving the sale or in setting it aside and ordering another sale upon proper statutory notice." (*Bovay v. Townsend,* 78 Fed. 2d 343, 346). The opinion of the Court of Appeals for the Ninth Circuit is in conflict with this decision, holding that it was unnecessary.

The new bid of Colter merely again reiterated his former bid at the identical price, but waived the demand for the cash accruing after August 18th, 1953, in the hands of the trustee, "from oil and the sale of other properties."

Although the first sale was advertised in two Los Angeles metropolitan newspapers, no advertisement of any character was placed in any of the daily city newspapers, but a small ad with inconsequential legal descriptions was placed in the Los Angeles Daily Journal, a legal newspaper with 4000 circulation among lawyers and judges.

Whether this was a new sale requiring new notice and new advertising of a character sufficient to attract substantial buyers and bring in much larger returns beneficial to the resulting *cestui que* trust, are important questions to be determined in the administration of the bankruptcy act.

V.

An important question of Bankruptcy Law is involved as to Whether the Rejection of the Sale or Re-referal to the Referee Requires New Bidding and New Advertising, and Whether in the Absence of Such Advertising to the Public, to the Creditors, to the Stockholders and Others, the Court had Jurisdiction to Make the Sale or to Have the Sale Confirmed at which COLTER had Bid Before But Without Condition.

There was no advertising of the new sale in the local newspapers; no hearing was held on the increase in value, and objections which were made to the Referee were quickly overruled.

Although the Colter bid was amended to purchase the property without condition that he was to receive all the income from the royalties of the oil and other incomes subsequent to the sale, on the rehearing the sale was again made to him as of the date of the sale; thus, allowing him to collect all of the oil royalties and other income during the reviews and appeal. There was a deposit in connection with the Colter bid of

$40,700.00 as a guarantee. The oil royalties alone are and have been paying approximately $3500.00 per month, or in excess of $42,000 per annum.

The new bid was accepted by another Referee and the confirmation was by another District Judge, without however any order setting up a new hearing date, advertising a new hearing, and advising the public generally; and, while the other order of confirmation, which had not been confirmed, was not set aside during these proceedings. It was only after the conclusion of these proceedings that the order of Referee Dickson, of December 9th, 1953, under review by Judge Paul J. McCormick (never confirmed) was vacated and set aside. The Referee and the District Court were therefore without jurisdiction to hear and determine the amended and supplemental petition of the trustee without calling a new hearing, without new notice on the new hearing, and without appropriate advertising.

The judgment and order, therefore, making a sale on an amended offer, without appropriate notice and without hearing thereon, is null and void as violative of the due process claims of the Fifth Amendment and the procedural sections of the Bankruptcy Act, Sections 58 and 59.

Bovay v. Townsend (8th Cir.) 78 Fed. 2d 343. Until this was done, the Referee did not have jurisdiction to hear and determine the amended and supplemental petition of the Trustee, or to vacate and set aside the order of another referee. The proceedings, therefore, were a nullity and void and should be set aside.

(See also Section 58 of the Bankruptcy Act, Title II, Chapter 6, Section 94).

The fundamental requisite of Due Process of Law is the opportunity to be heard fully upon due notice to all parties and to the public.

City of New York v. New York, New Haven & Hartford R. R. Co., 344 U. S. 293, 97 L. Ed. 333;

Grannis v. Ordean, 234 U. S. 385, 58 L. Ed. 1363;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865.

In the case of *New York v. New York, N. H. & H. R. Co.,* 344 U. S. 293, at 297, the court said:

> "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

In that case the court held that the mere fact that the City of New York might have had knowledge did not remove the statutory command for appropriate notice.

And, in this case, no notice of a new hearing was called for; no additional testimony was called for, and merely a hearing on the proposed amended bid, which was not a compliance with the Bankruptcy Act nor its purposes.

The first sale was completely advertised in two Los Angeles daily newspapers, but the last one was only

advertised in a small and uninformative ad in the Los Angeles Daily Journal, a legal newspaper which goes to lawyers and judges, but did not state any of the terms and conditions of the proposed new hearing, in any detail, nor any full or appropriate descriptions of the properties that were to be involved.

The Trustee in this case did not publicize the proposed sale, and the advertising was totally inadequate to apprise the public of what was being sold in that the locations of the land were not given except in a most general sense, and the oil royalties were only described in a like manner with no reference to its income or potentialities, and these descriptions were commingled with personal property offered and described as "sundry personal property with other assets" and only as miscellaneous scattered properties.

Such descriptions have been held to be wholly inadequate to apprise the public of what was being sold.

In Re Irvine, 255 Fed. 168;
In Re Champlain Pulp & Paper Co., 20 Fed. 2d 245.

Actually the properties involved in this case were highly valuable properties, the oil producing alone $3500.00 per month, or $42,000 annually. Verdugo Woodlands acreage is located in an exclusive area and highly valuable for subdivision purposes, and persons known to be fairly responsible financially were negotiating for the purchase of 40-acres of the 180-acre tract for that purpose.

Title 28, Section 2002 says:

> "A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated."

While Congress has not made this section applicable to Title XI, yet it has stated what it considers to be adequate notice in a public sale, and that there should be at least an advertisement in a newspaper regularly issued and of general circulation for at least four consecutive weeks prior to the sale.

There was no specific advertisement of the new hearing except the small ad appearing in the Daily Journal, a newspaper with a circulation of about four thousand copies daily in a city of a population of over two million, and a county of a population of over four million persons, and in a judicial district of perhaps in excess of five million people, many of whom are interested in oil development and investments and in real estate and housing.

VI.

Another important question to be decided by this Honorable Court is: Whether the District Court Erred in Authorizing and Directing the Sale of the Entire Properties in Solido rather than in Separate Parcels.

This estate might be divided into four separate categories:

1. The oil bearing properties located at Long Beach, California with an income of approximately $3500.00 per month, or $42,000.00 per annum;
2. The Verdugo Woodland Hills acreage consisting of 227 acres in the exclusive area of Glendale, California, available for exclusive subdivision property of the high quality and character;
3. The Tulare County land with its possibility of cotton production, and
4. The cash and income stored with the Trustee in its collections from the oil wells and properties.

A sale of the separate and diversed units to be far more profitable and beneficial to the estate than a sale in *solido*. It is like mixing oil and water and asking a buyer who wants oil to buy the water too, or visa versa.

The question as to whether the court and the trustee did not abuse its discretion is an important one in the administration of bankruptcy law.

VII.

Another important question raised by this petition is: Whether the Bankrupt Corporation is an aggrieved party within the meaning of the Bankruptcy Act, entitling it to Appeal, and to be represented by Counsel of its Choice.

Of course, where the bankrupt is the resulting *cestui que* trust and has a substantial reversionary interest in the estate, as it would have if this Court determined that the interest paid to the unsecured creditors dating back to 1935 is not allowable, the bankrupt has a substantial interest and, of course, has the right to be represented and is an aggrieved party as designated by the Bankruptcy Act, just as in Probate Estate any party who may have a substantial interest or claim by relationship, or otherwise, in the estate into any possible funds is an interested party and is aggrieved by any decision adverse to it.

VIII.

Another important question for consideration on review is: Whether the Order to Sell En Masse Stifles Competition and is not Equitable in the Circumstances Because it Would be a Needless Sacrifice of the Debtor's Property, Which is Subject to a Division, and a Smaller Portion of the Sale of the Property Would Satisfy the Debt.

In Re Haywood Wagon Co., (C. C. A. 2), 219 Fed. 655.

In the instant case the unsecured creditors could have been paid off in full on the amount they claimed of $187,000.00. The corporation could then have been discharged and declared solvent, and continued its existence even without a Chapter X proceeding. It was entitled to such treatment on equitable principles, having met all of its obligations 100 cents on the dollar. Separate sales, if so advertised, could have brought substantially more money, also.

The objections and the questions thus presented were considered on their merits by the Referee and the trial court on the presentation of the bankrupt. There is no reason why they should not be considered on review by this Court.

IX.

Another point raised by this appeal is: Whether the Proceedings Had in this Case were Proper and Lawful and Permitted under the Bankruptcy Act and were in Accordance with Law, where the District Court Declined to Confirm the Action of the Referee of December 9th, 1953 and Re-referred the Matter to the Referee, holding that the bid which had been confirmed was "not a firm bid within the meaning of the law" (Tr. 1, lines 13, 14), and Whether it was Necessary for the Referee to hold a New Sale and Conduct a Formal Hearing Before the Court in Accordance with the Court's Previous Order and Endeavor to Determine the Best Manner in which the Court Appraised $604,325.00 of Remaining Assets Can Be Best Disposed of, Including an Investigation as to any Special Value that May Exist in All the Properties, including those in Tulare County as to the Growing of Cotton and into the Verdugo Woodland Acreage Because of the Present Demand for Subdivision Purposes or Other Purposes, and as to the Value of the Oil Lands and Oil Income.

No such hearing was held by the Trustee, but instead the Trustee accepted an identical bid but waiving the demand for the cash accruing after August 18th, 1953.

Without any hearing, and without any evidence as directed by the District Court, another Referee merely conducted a purported sale of the assets in which the

original bidder again received the property but at a higher price as of the date of the sale, but still reserving to himself all the oil accumulations and increment during the time the appeal is pending, and thus not being a firm bid without any strings to it.

We submit that the second Referee had no jurisdiction to set aside the bid of the first referee and to conduct a sale while the first bid was still pending, and without holding the hearings and having a new and complete investigation and a new and complete sale, in accordance with the first District Judge's direction.

Procedurally, this presents an important question of Bankruptcy Law which has not been but should be determined by this Honorable Court.

X.

Another question presented by this appeal is: Whether the Sale was Necessary at All and in the best interest of the Estate. It was not necessary to sell $604,325.00 of Court appraised assets in order to pay creditor's claims in the sum of $187,123.88, and remaining expenses of administration.

It is obvious that with an income of at least $3500.00 a month from oil alone the unsecured creditors could be paid off out of income, and if any portion of the subdivsion real estate sold they could have been paid up one-hundred cents on the dollar. To order a sale and conduct a sale when the corporation is so close to being fully cleared was and is inequitable. The Trustee

should have been compelled, in the interest of the corporation, to submit a Plan of Arrangement or to carry on and complete the payment of creditors rather than liquidate the assets.

XI.

Another question presented by this appeal is: Whether the Sale as Conducted through the Attorney for the Purchaser, who was formerly the attorney for the Bankrupt Corporation, Does Not Present a Question of Fraud on its Face so as to Nullify the Sale.

Wm. H. Neblett was the attorney for the corporation from its outset. He appeared as attorney of record for the corporation. At that time he was a law partner of the late Senator William Gibbs McAdoo and by reason thereof wielded considerable influence. He was then in a confidential relationship with the corporation at all times and in a position of influence in this matter. Since that time he has been and is acting adversely to that of his client and he represented and is purportedly representing Colter, but according to his affidavit a syndicate headed by Colter in the purchase of the Newport assets.

An attorney for the Bankrupt is bound in all matters to act in the highest good faith toward his beneficiary, or client or former client, and may not obtain any advantage therein over the latter by his former confidential position, which results in his own profit. His interest, adverse to that of his former client, taints the whole transaction as inequitable and improper.

Schroeder v. Young, 161 U. S. 334, 40 L. Ed. 721;
Byers & Surget, 19 How. 303, 15 L. Ed. 670.

Such a purchase by the syndicate headed by Neblett or represented by him cannot be a bona fide purchase.

Gay v. Parpart, 106 U. S. 679, 27 L. Ed. 256.

The court has a duty to look behind the whole sale and determine whether the corporate interest is injured.

Pepper v. Litten, 308 U. S. 295, 84 L. Ed. 281.

An attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.

Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065.

We think the same principle should apply where the attorney has represented the client. (See *Schroeder v. Young,* 161 U. S. 334, 40 L. Ed. 721 and *Marsh v. Whitmore,* 21 Wall. 178, 22 L. Ed. 482.

XII.

Another question presented by this appeal is: Whether the Circuit Court should not have remanded the case to the District Court for the purpose of taking further testimony upon the allegation that a fraud was perpetrated on the District Court in the Sale.

The motion was based upon the fact that the Referee during the conduct of the sale required the potential buyers to qualify as "qualified buyers." Representations were made to the court that R. T. Colter was the actual purchaser of the property and that he was a "qualified buyer" and had assets himself to pay the full amount. That the very time the hearings were held and a confirmation of the order of sale was made, R. T. Colter was not physically or mentally qualified to carry on negotiations for the purchase, nor was there any present intention on his part actually to make the purchase of the properties himself and complete the same. (R. 647). This was a fraud upon the court which required each potential buyer to be the person who intended to buy and to qualify as such purchaser.

It was also represented to the Referee that Mr. Colter did not plan to pay the sum of $407,000.00 through the sale of certain of these assets. (R. Tr. 120, 121).

The affidavit in support of the motion alleged that at the very time of the motion Mr. Colter was then 82 years of age; had recently been operated on for a brain tumor, and was in no condition to carry on such physical activities.

The answering affidavit, prepared by Mr. Wm. Neblett, the former attorney for the Newport Corporation, admitted that the deal was not made by Colter individually but by a syndicate (supposedly) headed by Mr. Colter and that the purchase was being made by "several syndicate members" (R. 695); and he says, since the sale was concluded another attorney is representing the "syndicate."

Since the sale was not made to a qualified buyer in accordance with the order of the Referee but juggled around for a syndicate represented by the former attorney for the Newport Corporation, the cause should have been remanded to the District Court for the investigation of whether the transaction was fraud upon the court.

Where there is a fraud upon the court it vitiates the transaction and should be thoroughly examined by the Court. And, where the court qualifies a specified buyer, the sale must be conducted in accordance with that order. Any other procedure is unfair to the other bidbers and to the appellant and is misleading.

Misstatements to the court are a fraud upon it.

United States v. Gilliland, 312 U. S. 86, 85 L. Ed. 598.

Fraud vitiates everything.

People v. Iseman, 78 Cal. App. 223.

And, where a procedure has been fraudulent, the court has power to remand the case for the taking of further

testimony or the setting aside of the proceedings in the District Courts.

Title 28, Section 2106 U. S. Codes;
Arkansas Valley Smelting Co. v. Mining Co., 127 U. S. 379;
Sisters of Notre Dame v. Kusmitt, 125 Md. 323, L. R. A. 1916D 792.

We submit that such proceedings present an important question of Bankruptcy Law which this Court should pass upon.

XIII.

Another question of importance is: Whether the Sale was Fair and Equitable to the Stockholders.

As Mr. Justice Reed said in *In Re Equitable Office Building Corporation,* Debtor, 96 L. Ed. 1386, at 1390:

> "A court or reorganization guards with equal solicitude the equity of stockholders and the priority of creditors."

The same principles should apply in this case, but no consideration was given to the interest or the equity of the stockholders.

The purported sale should, therefore, have been referred back to the District Court for the taking of further testimony to determine if it was in compliance with its orders or whether a fraud had been perpetrated upon it, and the Circuit Court erred in denying the motion.

We respectfully submit that all of these questions are highly important in the administration of, and in fair administration of, the bankruptcy laws and represent not only questions of importance which this Court should pass upon, but also represent questions of conflict between the Circuits which should be resolved by this Court.

After 19 years as a going concern, this corporation should not have been liquidated to the oblivion of any benefits of its stockholders and the corporation itself. Congress has repeatedly passed laws since 1933 to protect landowners to wit Sections 74 and 77B of the Bankruptcy Act and Chapter XII of the Act. While the latter does not apply to corporate landowners, the intent and spirit of Congress in these various enactments, should apply to this substantial corporate landowner, who should not be wiped out after payment of $2,000,000 indebtedness. Reorganization, not liquidation, should be permitted. Fantastic allowances of interest at this time should not be permitted. Failure of the trustee to pay the franchise tax of the State of Delaware should not rob petitioner of his day in court on the merits of his rights. He should have his day on appeal on the merits. We, therefore, respectfully pray that this Honorable Court grant certiorari and reverse the judgment and orders below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.